

**Tentative Rulings for August 24, 2016**  
**Departments 402, 403, 501, 502, 503**

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There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

12CECG02339	<i>Fresno Automotive Development v. San Jose Construction Co. Inc. and related cross-action</i> (Dept. 503)
16CECG00804	<i>Estrada v. Lowery</i> (Dept. 501)

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The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

14CECG00572	<i>Baldwin v. Aon Risk Services Companies, Inc.</i> (Dept. 403) [Hearing on motion to regulate order of proof at trial is taken off calendar.
15CECG00549	<i>Casillas v. Central California Faculty</i> is continued to Wednesday, August 31, 2016 at 3:30p.m. in Dept. 503.
15CECG03330	<i>Champion Home Builders, Inc. v. CFG Capital, Inc.</i> is continued to Wednesday, August 31, 2016 at 3:30p.m. in Dept. 503.
16CECG00059	<i>The State of California v. PRG Farms, LP</i> is continued to Wednesday, September 14, 2016 at 3:30 p.m. in Dept. 503. If the parties' anticipated stipulation and order has been received and processed before that time, the motion will be ordered off calendar.
15CECG01387	<i>Quality Spruce Properties, LLC v. Sierra Community Center</i> is continued to Wednesday, August 31, 2016 at 3:30 p.m. in Dept. 502.
16CECG00473	<i>Abelardo Suarez v. Beverly Healthcare – California, Inc.</i> is continued to Thursday, August 25, 2016 at 3:30 p.m. in Dept. 501.

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(Tentative Rulings begin at the next page)

# **Tentative Rulings for Department 402**

(23)

## **Tentative Ruling**

Re: **Robert Gonzalez v. Ashley M. Avila**  
Superior Court Case No. 14CECG01946

Hearing Date: Wednesday, August 24, 2016 (**Dept. 402**)

Motion: Defendants Ashley Michelle Avila's, Donald Blanchard's, and Holly Starr Blanchard's Motion for Leave to File Cross-Complaint

### **Tentative Ruling:**

To grant Defendants Ashley Michelle Avila's, Donald Blanchard's, and Holly Starr Blanchard's motion for leave to file cross-complaint. (Code Civ. Proc., §§ 428.10, subd. (b) & 428.50, subd. (c).)

In order to avoid confusion with the cross-complaint filed by Defendants Ashley Michelle Avila, Donald Blanchard, and Holly Starr Blanchard on April 20, 2016 and struck in its entirety by the Court on July 6, 2016, the newly filed cross-complaint is to be called the first amended cross-complaint. Defendants Ashley Michelle Avila, Donald Blanchard, and Holly Starr Blanchard are directed to file and serve the first amended cross-complaint within 10 calendar days after service of the minute order.

### **Explanation:**

Defendants Ashley Michelle Avila, Donald Blanchard, and Holly Starr Blanchard ("Defendants") move the Court for an order permitting them to file a cross-complaint against third persons Ruan Jun and Paul Holguin Flores. Since the Court has already set the first trial date, Defendants cannot file their cross-complaint as of right. (Code Civ. Proc., § 428.50, subds. (b) & (c).)

A trial court may grant leave to file a permissive cross-complaint against a co-defendant or third person not yet a party to the action only if the "cause of action asserted in his cross-complaint (1) arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause brought against him or (2) asserts a claim, right, or interest in the property or controversy which is the subject of the cause brought against him." (Code Civ. Proc., § 428.10, subd. (b).) Further, a trial court may grant leave to file a permissive cross-complaint "in the interest of justice at any time during the course of the action." (Code Civ. Proc., § 428.50, subd. (c).)

In this case, Defendants' proposed cross-complaint against third parties Ruan Jun and Paul Holguin Flores asserts causes of action for implied indemnification, contribution, and declaratory relief, which clearly arise out of the same occurrences or series of occurrences as the causes of action brought by Plaintiffs Robert Gonzalez and

Pearl Gonzalez against Defendants. (*Time for Living, Inc. v. Guy Hatfield Homes/All American Development Co.* (1991) 230 Cal.App.3d 30, 39 ["An indemnity claim effectively seeks to apportion among the parties to the indemnity action the precise liability claims by the plaintiff in the main action; therefore the indemnity claim of necessity arises out of the same occurrences or series of occurrences as asserted by the plaintiff."].) Further, there is no evidence that granting Defendants leave to file the proposed cross-complaint against Ruan Jun and Paul Holguin Flores is not in the interest of justice.

Consequently, the Court grants Defendant's motion for leave to file a cross-complaint. (Code Civ. Proc., §§ 428.10, subd. (b) & 428.50, subd. (c).)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

## Tentative Ruling

Issued By: JYH on 08/23/16.  
(Judge's initials) (Date)

(20)

**Tentative Ruling**

Re: **BMO Harris Bank N.A. v. Kumar.**, Superior Court Case No. 16CECG01675

Hearing Date: **August 24, 2016 (Dept. 402)**

Motion: Application for Writ of Possession

**Tentative Ruling:**

To deny.

**Explanation:**

"At the hearing, a writ of possession shall issue if both of the following are found: (1) The plaintiff has established the probable validity of the plaintiff's claim to possession of the property. (2) The undertaking requirements of Section 515.010 are satisfied." (Code Civ. Proc. § 512.060.)

While plaintiff has shown probable validity of its claims, it has not satisfied the undertaking requirements.

The party seeking possession is generally required to file an undertaking. (Code Civ. Proc. § 512.060(b).) Plaintiff has not done so.

However, if it is determined that the defendant has no interest in the claimed property, "the court shall waive the requirement of the plaintiff's undertaking and shall include in the order for issuance of the writ the amount of the defendant's undertaking sufficient to satisfy the requirements of subdivision (b) of Section 515.020." (Code Civ. Proc. § 515.010(b).) Otherwise,

" . . . the undertaking shall provide that the sureties are bound to the defendant for the return of the property to the defendant, if return of the property is ordered, and for the payment to the defendant of any sum recovered against the plaintiff. *The undertaking shall be in an amount not less than twice the value of the defendant's interest in the property or in a greater amount.*

(Code Civ. Proc. § 515.010(a), emphasis added.) To determine the value of defendant's interest, the court should take "the market value of the property less the amount due and owing on any conditional sales contract or security agreement and all liens and encumbrances on the property, and any other factors necessary to determine the defendant's interest in the property." (*Ibid.*)

Plaintiff has not submitted adequate evidence of the value of the equipment that is the subject of this motion. The only evidence submitted is the statement of Kevin Evers, employee of plaintiff: "Amongst my duties with Plaintiff, I am required to know the market price for used equipment. Therefore, based upon my experience as

Litigation Specialist for Plaintiff, the fair market value of the Equipment covered by the Agreements is \$51,526.00." (Evans Dec. ¶ 36.)

That Mr. Evers is *supposed* to know the value of the equipment does not establish that he does know the value. The declaration is lacking facts establishing foundation for Mr. Evers' knowledge of this fact. Additionally, the statement is very vague. The two agreements secure in total five different pieces of equipment, and plaintiff only seeks possession of two of them. It is unclear whether the \$51,526 is the value of all five pieces of equipment, or just the two subject to this motion. Plaintiff has not shown that an undertaking should not be required, and has not provided the court with enough evidence to determine the fair market value of the property.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**

**Issued By:**           JYH           **on 08/23/16 .**  
                                    (Judge's initials)                      (Date)

(29)

**Tentative Ruling**

Re: ***Orion Distributing, Inc. v. Daniel Pizarro, et al.***  
Superior Court Case No. 16CECG00225

Hearing Date: August 24, 2016 (Dept. 402)

Motion: Cross-Defendants' motion to strike

**Tentative Ruling:**

To grant the motion to strike, with leave to amend. (Civ. Code §3294.)

**Explanation:**

Motion to strike:

Civil Code section 3294, subdivision (a), provides "in an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." In the absence of an independent tort, punitive damages are not available in a breach of contract action. (Civ. Code §3294; *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 516.)

"'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civ. Code §3294(c)(2).) Malice is "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civ. Code §3294(c)(1).) "Despicable" conduct is "conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people." (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1287.)

To support a claim for punitive damages, plaintiff must allege ultimate facts showing the defendant's oppression, fraud, or malice. (Civ. Code §3294.) It is insufficient to plead oppression, fraud or malice in conclusory terms. (*Cyrus v. Haveson* (1976) 65 Cal.App.3d 306, 316–17; see also *Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 872 [conclusory characterization of defendant's conduct as intentional, willful and fraudulent is "a patently insufficient statement of 'oppression, fraud, or malice,' express or implied, within the meaning of [Civ. Code] section 3294."].) Exemplary damages may be properly awardable in an action for conversion, given the required showing of malice, fraud, or oppression. (*Haigler v. Donnelly* (1941) 18 Cal.2d 674, 681.)

In the case at bench, Cross-Complainant's pleading fails to adequately allege facts supporting a claim for punitive damages against moving parties. Cross-Complainant attempts to meet the requirements of Civil Code section 3294 by alleging that moving parties' conduct "was and is tortious, malicious, outrageous, oppressive,

fraudulent, in bad faith and in conscious disregard for the rights of cross-complainant herein." (First Amended Cross-Complaint, ¶125.) Conclusory language such as this is insufficient to support a request for punitive damages. Accordingly, the motion to strike is granted, with leave to amend.

Request for Judicial Notice:

Judicial notice is taken as requested by moving parties.

Pursuant to California Rules of Court, rule 3.1312, and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

## Tentative Ruling

Issued By: JYH on 08/23/16.  
(Judge's initials) (Date)

# **Tentative Rulings for Department 403**

(27)

## **Tentative Ruling**

Re: **Ramos v. Manco Abbot, Inc., et al.**  
Superior Court Case No. 14CECG02251

Hearing Date: **August 24, 2016 (Dept. 403)**

Motions: Plaintiffs motion to tax Gibson's costs

### **Tentative Ruling:**

To grant.

### **Explanation:**

Recovery of costs under FEHA is discretionary, not mandatory. (Gov. Code § 12965(b).) To justify awarding costs to a prevailing defendant, the action must have been either "objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so." (*Williams v. Chino Valley Independent Fire, Dist.*, (2015) 61 Cal.4th 97, 115.) Essentially, awarding costs to the defendant requires findings that the plaintiff's case was meritless, groundless or without foundation – "rather than simply that the plaintiff has ultimately lost his case." (*Mangano v. Verity* (2008) 167 Cal.App.4th 944, 949, quoting *Christianburg Garment Co. v. EECO* (1978) 434 U.S. 412, 421; see also *Williams, supra*, 61 Cal.4th at 115 [applying the *Christianburg* standard to costs as well as attorney fees – the claim must be found objectively unreasonable.].)

Here, the plaintiffs' claims, while ultimately insufficient to satisfy their burden to avert summary judgment, nevertheless raised articulable legal and factual issues arising from the degree of control Gibson maintained over the property manager. The court's summary judgment ruling itself reflects the court's consideration of the various evidentiary matters extracted during the discovery process which refined those issues – particularly whether Gibson exercised or retained control over the property manager sufficient to establish vicarious liability. That the determination turned on the consideration of such issues indicates their outward merit. Accordingly, the court cannot make the findings of objective unreasonableness as required to award Gibson their costs. Plaintiff's motion is therefore granted.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

### **Tentative Ruling**

Issued By:     KCK     on 08/23/16.  
                    (Judge's initials)      (Date)

(28)

**Tentative Ruling**

Re: **DiSalvo Law Office v Ochoa**

Case No. 14CECG02391

Hearing Date: August 24, 2016 (Dept. 403)

Motion: By Defendant for Attorneys' Fees and Costs Against Plaintiff.

**Tentative Ruling:**

To grant the motion for attorney's fees. The Court awards attorney's fees in the amount of \$12,720.

The motion is denied without prejudice to the extent it seeks costs.

**Explanation:**

*Merits of the Motion*

Defendant seeks attorney's fees pursuant to Code of Civil Procedure §425.16, subdivision (c) which indicates that a prevailing defendant on a special motion to strike "shall be entitled to recover his or her attorney's fees and costs." The Court will award only such fees as the Court deems reasonable. *Robertson v. Rodriguez* (1995) 36 Cal.4th 347, 362.) Furthermore, only fees and costs incurred on the motion to strike itself are recoverable, and not fees and costs for the entire litigation. (*Lafayette Morehouse, Inc. v. Chronicle Pub. Co.* (1995) 39 Cal.App.4th 1379, 1383.)

Here, Plaintiff appears to object to the attorney's fees motion on three grounds: that the motion is untimely; that to award the attorney's fees would be "inequitable"; and that the motion seeks fees for duplicate work.

Plaintiff's timeliness argument is based on the argument that the Court gave defendant 60 days from the date of the order in which to file her motion. (See Minute Order of May 17, 2016.) However, as Defendant notes, the time in which to file such a motion is within 60 days after service of notice of entry of order or 180 days after entry of the order granting the motion. (Cal.Rule of Court 8.104, subd.(a).) No document entitled "Notice of Entry" appears in the Court's files. Therefore, Defendant had 180 days from the order in which to file the motion, and the motion is timely.

Plaintiff's inequity argument appears to ask the Court to revisit the reasons for the granting of the motion in the first place. Because a prevailing defendant is entitled to recover their attorney's fees (Code Civ.Proc. §425.16, subd.(c)(1)), and defendant is the

prevailing party on this motion, Defendant is therefore entitled to an award of attorney's fees.

Finally, Plaintiff argues that the fees sought by Defendant are, in part, duplicative or otherwise not incurred as a consequence of the Anti-SLAPP motion itself.

Defendant seeks attorney's fees for work done on the motion for relief from the default. Attorney's fees are recoverable "only on the motion to strike, not the entire suit." (*Lafayette Morehouse, Inc. v. Chronicle Publishing* (1995) 39 Cal.App.4th 1379, 1383.) Defendant has pointed to no case law that holds that an application for relief from default is sufficiently related to the Anti-SLAPP motion such that work done on such a motion would be recoverable as attorney's fees. Therefore, the fees award is reduced by the amount spent on the motion for relief.

Finally, the points and authorities for both anti-SLAPP motions do appear to be fairly similar. However, Defendant only billed 2.5 hours for the revisions to the moving papers. This seems reasonable given a comparison between the two documents. Defendant has provided an entry for 6.5 hours for "Motion (13 pages)" for May 9, 2016. However, based on the timing of the entry, this is actually for the second reply brief, which does not contain the duplicative work Plaintiff is complaining of. Therefore, the Court will not reduce the fees awarded for those entries.

#### *Lodestar Method*

When awarding attorney's fees in California, a Court will typically adopt the "lodestar" method to determine the amount to award. This is the equivalent of the number of hours reasonably expended by the reasonable hourly rate prevailing in the community for similar work. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1136.) The lodestar amount may be adjusted by factors such as the moving party's attorney's experience and abilities, and the novelty and difficulty of the issues involved in the motion. (*Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 345.)

Defendant seeks compensation for 52.20 hours of work on the motions. Of this, 20.40 hours were spent on "Proceedings to Obtain Hearing on First Anti-SLAPP motion," which are for the time spent on the motion for relief from the default, and are therefore discounted from the recoverable hours. Therefore, Defendant will recover for no more than 31.80 hours as time "reasonably" spent on the motion.

Defendant's counsel's declaration does not indicate what the "reasonable hourly rate prevailing in the community for similar work" should be. Defendant's counsel's declaration does provide a factual basis for determining that counsel has extensive experience and abilities in this field. Plaintiff, in its motion, did not object to the requested rates, however.

Defendant provided no basis for the increase in the reported hourly rate from \$400 to \$450. Furthermore, there appears to be no basis for the requested increase in the lodestar to 1.5.

Therefore, the Court will award 31.80 hours at a rate of \$400 per hour for a total of \$12,720 in attorney's fees.

In the motion, Defendant asks for certain costs to be awarded. However, a Memorandum of Costs has not been filed as required by California Rule of Court 3.1700, subdivision (a). Therefore, the request for costs is denied without prejudice.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

## Tentative Ruling

**Issued By:** KCK **on 08/23/16.**  
(Judge's initials) (Date)

(28)

**Tentative Ruling**

Re: **Gill, et al. v. St. Agnes Medical Center, et al.**

Case No. 15CECG01916

Hearing Date: August 24, 2016 (Dept. 403)

Motion: By Defendant Karandeep Singh to compel responses to form interrogatories, special interrogatories, request for production of documents and request for nature and amount of damages from Plaintiffs Surinder Gill, Anoop Gill, and Sandeep Gill, and for monetary sanctions in the amount of \$660.00.

**Tentative Ruling:**

To grant the motion to compel. Each of the responding parties shall provide verified responses to each of the propounded discovery requests within ten court days of notice of this order.

The Court also awards sanctions against the responding parties in the amount of \$510.00.

**Explanation:**

Note- to date there appears to be no opposition or reply brief in the Court's files.

*Interrogatories, Requests for Production, and Request for Nature and Amount of Damages*

When a party has not responded to Interrogatories all a moving party need show is that a set of interrogatories was properly served on the opposing party, that the time to respond has expired, and that no response of any kind has been served. (Cf. *Leach v. Superior Court* (1980) 111 Cal.App.3d 902, 905-06; CRC 3.1345 (no need for separate statement or meet and confer).)

Here, the moving party has presented evidence to show that the interrogatories were properly served and that no responses have been served.

Likewise, when a party has not responded to Requests for Production, a responding party waived all objections, including privilege and work product. (CCP §2031.300.) There is no timeline on the motion and no need for a meet and confer. (CCP §2031.300.)



(5)

**Tentative Ruling**

Re:

***Gwartz et al. v. Weilert, et al.***  
Superior Court Case No. 09CECG01032

Hearing Date:

August 24, 2016 **(Dept. 403)**

Motion:

By Judgment Creditors to amend the judgment nunc pro tunc

**Tentative Ruling:**

To grant the motion. The judgment is amended to reflect the inclusion of costs and fees such that the amount of the judgment is **\$2,667,144.37**.

**Explanation:**

Background

On October 30, 2012, a judgment in favor of the Plaintiffs in the amount of **\$1,553,800** was entered after a jury found in favor of the Plaintiffs. On November 14, 2012, Plaintiffs as prevailing parties filed a Memorandum of Costs in the amount of \$102,169.69. On March 5, 2013, a hearing was held on the Defendants' motion to tax costs. The tentative ruling indicated that the motion would be granted in part and denied in part. After the hearing, the Court adopted the tentative ruling as the order of the Court. Ultimately, \$24,587.41 was taxed. As a result, **\$76,582.28** was awarded as costs. See Order filed on March 5, 2013.

On May 14, 2014, the Court granted Plaintiffs' motions and awarded the sum of **\$541,794.70** in attorney's fees for the representation by the law firm of Dowling and Aron. The sum of **\$397,927.05** was awarded for the representation by the law firm of Daniel Spitzer. See Minute Order filed on June 12, 2014.

On February 2, 2015, the Plaintiffs as Respondents submitted a Memorandum of Costs on Appeal (F067958) totaling **\$813.09**. On the same day, they submitted another Memorandum of Costs on Appeal (F066581) totaling **\$1453.25**.

On May 21, 2015, the Court granted Plaintiffs' motions and awarded the sum of **\$15,469** incurred on the appeal of the assignment, turnover and charging orders as well as the sum of **\$79,305** incurred on the appeal itself. See Minute Order entered on May 21, 2015.

**Merits**

Attorneys' fees are allowable as costs regardless of whether authorized by contract, statute, or law. [C.C.P. 1033.5(a)(10)] However, rather than being recoverable under the cost bill procedure, they are generally recovered by noticed motion filed after judgment in the underlying action. [See C.C.P. 1033.5(c)(5)]

"When a judgment includes an award of costs and fees, often the amount of the award is left blank for future determination. ... After the parties file their memoranda of costs and any motions to tax, a postjudgment hearing is held and the trial court makes its determination of the merits of the competing contentions. When the order setting the final amount is filed, the clerk enters the amounts on the judgment nunc pro tunc." [Grant v. List & Lathrop (1992) 2 Cal.App.4th 993, 996, 997; see Nazemi v. Tseng (1992) 5 Cal.App.4th 1633, 1637]

Here, the amounts of:

- \$76,582.28;
- \$541,794.70;
- \$397,927.05;
- \$813.09;
- \$1453.25;
- \$15,469.00; and
- \$79,305.00

were awarded to the judgment creditors in their capacities of prevailing parties. The judgment will be amended nunc pro tunc to reflect these awards. [*Aspen Int. Capital Corp. v. Marsch* (1991) 235 Cal.App.3d 1199, 1204.]

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

## Tentative Ruling

**Issued By:** KCK **on** 08/23/16.  
(Judge's initials) (Date)

(6)

**Issued By:** MWS **on 08/23/16.**  
(Judge's initials) (Date)

(29)

**Tentative Ruling**

Re: ***Edward Pena v. Manco Abbott, et al.***  
Superior Court Case No. 15CECG03954

Hearing Date: August 24, 2016 (Dept. 501)

Motions: Strike; compel

**Tentative Ruling:**

To deny the motion to strike the request for punitive damages. To grant the motion to strike the request for attorney's fees, with leave to amend. To take the motion to compel off calendar.

**Explanation:**

Motion to strike:

There is a "long line of decisions in this state" holding that punitive damages are recoverable where an unintentional tort is alleged if the defendant's conduct constitutes a conscious disregard of the probability of injury to others. (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 811; Civ. Code §3294; see also *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 895-896; *G. D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22, 32.) On a motion to strike, the court must read the language sought to be stricken not in isolation, but in the context of the facts alleged in the complaint (*Monge v. Superior Court* (1986) 176 Cal. App. 3d 503, 510); where the complaint, as a whole, contains sufficient facts to apprise the defendant of the basis for plaintiff's requested relief, it is sufficient to defeat the motion. (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6.)

Though conduct that results in injury may be characterized as nondeliberate, when it is done in conscious disregard of others' safety, it may be "sufficiently blameworthy to warrant an assessment of punitive damages." (*Ford Motor Co. v. Home Ins. Co.* (1981) 116 Cal.App.3d 374, 382; *Nolin v. National Convenience Stores, Inc.* (1979) 95 Cal.App.3d 279, 286.) Whether a plaintiff is entitled to present his or her punitive damages claim to the jury depends upon whether plaintiff makes a sufficient showing of defendant's malice or oppression to create a triable issue of fact. (Civ. Code §3294.) "Malice" includes conduct engaged in with a conscious disregard of the rights or safety of others. (*Id.* at (c)(1); *Courtesy Ambulance Service v. Superior Court* (1992) 8 Cal.App.4th 1504, 1518.)

In the case at bench, Plaintiff alleges that Defendants were repeatedly informed that the balcony railing was faulty and that the lights in the stairwell were inoperative. A detached railing on an upper-story balcony is clearly a dangerous condition. Plaintiff alleges that Defendants were aware of the broken railing, chose not to repair it (in fact, stated that they were not going to repair it because the property was to be foreclosed on), that the railing was left in an unsafe state for an extended period, and that when

Plaintiff leaned on it, it gave way, causing Plaintiff to fall and sustain injuries to his ankle. Plaintiff has sufficiently supported his claim for punitive damages at the pleading stage. Accordingly, Defendants' motion to strike Plaintiff's claim for punitive damages is denied.

Attorney's fees are recoverable only where they are provided for by contract or statute. (*City of Industry v. Gordon* (1972) 29 Cal. App. 3d 90, 93.)

Here, Plaintiff does not cite any authority establishing his right to attorney's fees. Instead, he argues that because he plans to get an attorney, it is more efficient to seek attorney's fees now, rather than seek leave to file an amended complaint in the future to add the request for attorney's fees. This is insufficient support to defeat Defendants' motion to strike the request for attorney's fees. Accordingly, the motion to strike the request for attorney's fees is granted, with leave to amend.

Motion to compel:

Defendants set one motion to strike and one motion to compel, however submitted two motions to strike, and payment for three motions. The Court notified Defendants on July 20, 2016, that the two motions to compel were being rejected, and instructed Defendants to contact the law and motion department to clarify what should have been set. It appears that Defendants did not contact law and motion. The Court found no moving papers for a motion to compel in the file. Accordingly, the motion to compel is taken off calendar.

Pursuant to California Rules of Court, rule 3.1312, and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

## Tentative Ruling

**Issued By:** MWS **on 08/23/16.**  
(Judge's initials) (Date)

# **Tentative Rulings for Department 502**

03

## **Tentative Ruling**

Re: **Stratton v. Strack**  
Case No. 15 CE CG 03128

Hearing Date: August 24<sup>th</sup>, 2016 (Dept. 502)

Motion: Defendant's Demurrer to First Amended Complaint

### **Tentative Ruling:**

To sustain the demurrer to the entire first amended complaint, with leave to amend, for failure to state facts sufficient to constitute a cause of action and uncertainty. (Code Civ. Proc. § 430.10, subd.'s (e), (f).) Plaintiff shall serve and file his second amended complaint within 10 days of the date of service of this order. All new allegations shall be in **boldface**.

### **Explanation:**

First, defendant has argued that plaintiff lacks standing to sue in his individual capacity, because both of his claims allege injuries to the LLC rather than to him as an individual.

" 'It is a general rule that a corporation which suffers damages through wrongdoing by its officers and directors must itself bring the action to recover the losses thereby occasioned, or if the corporation fails to bring the action, suit may be filed by a stockholder acting derivatively on behalf of the corporation. An individual [stockholder] may not maintain an action in his own right against the directors for destruction of or diminution in the value of the stock...' " (*Rankin v. Frebank Co.* (1975) 47 Cal.App.3d 75, 95.)

"[A]n individual cause of action exists only if the damages were not incidental to an injury to the corporation. The cause of action is individual, not derivative, only "where it appears that the injury resulted from the violation of some special duty owed the stockholder by the wrongdoer and having its origin in circumstances independent of the plaintiff's status as a shareholder.'" [¶] In other words, it is the gravamen of the wrong alleged in the pleadings, not simply the resulting injury, which determines whether an individual action lies." (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 124, internal citations omitted.)

Here, it is unclear whether the injury that is alleged in the FAC was to the individual plaintiff or to the company. Plaintiff alleges in conclusory fashion that the injury was to him personally rather than to the LLC. (FAC, ¶¶ 38, 39.) However, he does not clearly allege which wrongful acts of defendant injured him, or exactly how he was injured. The only specific harm alleged is that defendant and the LLC were held liable

for damages to RNS Farms after defendant entered into "transactions" with RNS and RNS sued the LLC as a result. (*Id.* at ¶¶ 24-33.) Yet there are no clear allegations as to what exactly defendant did wrong that caused the LLC to be sued. Since defendant was acting in his capacity as manager of the LLC when he entered into the transactions with RNS, and since plaintiff did not become sole owner of the company until October 11<sup>th</sup>, 2011 (*id.* at ¶¶ 22, 23), it appears that any damages would have been to the LLC and not to plaintiff personally. In fact, plaintiff clearly alleges that only the LLC and defendant were held liable for damages to plaintiff, not plaintiff personally. (*Id.* at ¶ 26.)

On the other hand, plaintiff does allege that he contributed to pay for the defense of the company and defendant (*id.* at ¶ 25), which might support a showing of personal harm to him, as opposed to the company. Plaintiff also alleges that he was injured because he was denied the right to be able to make fully informed decisions. (*Id.* at ¶ 38.) Plaintiff contends that courts have found that an injury is directly to the individual rather than the company when the individual member is denied the right to vote or make fully informed decisions. (*New York City Employees' Retirement System v. Jobs* (2010) 593 F.3d 1018, 1022-1023; overruled on other grounds by *Lacey v. Maricopa County* (2012) 693 F.3d 896.)

First, the *New York City Employees' Retirement* case was decided by the Ninth Circuit by interpreting Delaware state law (*id.* at p. 1023), so it is unclear whether the court would have reached the same result if it had been applying California law. In any event, even assuming that the denial of a member's right to make fully informed decisions is an individual right under California law, plaintiff has failed to allege any facts to explain what information he was not provided or what decisions he might have made differently if he had been provided with more information, or how the denial of information caused him actual harm. Plaintiff appears to be alleging that defendant concealed or did not disclose some facts to him, but he does not allege what information defendant should have given him or how the information would have made any difference to his actions. It is not even clear if the information related to the transactions with RNS, the conduct of the RNS litigation, or some other matter. Therefore, plaintiff has not clearly alleged any facts showing individual harm to himself as opposed to the LLC, and the court intends to sustain the demurrer to both causes of action for failure to allege the essential element of damages. However, the court will grant leave to amend, since it is possible that plaintiff might be able to allege facts showing that he suffered injury as an individual, rather than simply harm to the company.

Also, with regard to the first cause of action for breach of contract, the claim is insufficiently alleged and uncertain because plaintiff has failed to allege the terms of the contract, what specific contractual duties defendant allegedly breached, or how he breached them. The essential elements of a claim for breach of contract are: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff. (*Reichert v. General Ins. Co. of America* (1968) 68 Cal.2d 822, 830.) "If the action is based on an alleged breach of a written contract, the terms must be set out verbatim in the body of the complaint or a copy of the written instrument must be attached and incorporated by reference."

(*Otworth v. Southern Pac. Transportation Co.* (1985) 166 Cal.App.3d 452, 458–459, internal citations omitted.)

Here, the first amended complaint alleges that there was a written contract between the parties, namely the operating agreement for the LLC. (FAC, ¶ 7.) However, plaintiff does not attach a copy of the operating agreement to the FAC, nor does he allege the essential terms of the agreement. He merely alleges in vague and conclusory fashion that the agreement was to establish a limited liability company under California law, that the company was called S&S Produce, LLC, and that the members of the LLC were plaintiff and defendant. (*Id.* at ¶¶ 8-12.) The FAC also alleges that the operating agreement was to govern the relations among the members, and between the members and the company, and that, “[t]o the extent that the operating agreement did not otherwise provide for such matters, the governing provisions were implied by statute, to wit, the Beverly-Killea Limited Liability Company Act (Corp. Code §§ 17000 et seq.)” (*Id.* at ¶¶ 14, 15.)

None of these allegations set forth the essential terms of the operating agreement or the rights and duties of the parties to the agreement. The allegations are entirely generic to any LLC, and do not tell the defendant or the court anything about the actual purpose of the LLC, or the roles that each member of the LLC was to play. While plaintiff attempts to fill these gaps by stating that the agreement incorporated California law with regard to LLC's, this allegation cannot replace allegations describing the basic terms of the operating agreement. Therefore, the FAC fails to adequately allege the nature of the agreement that existed between the parties.

In addition, plaintiff fails to allege any facts showing how defendant breached his duties toward plaintiff or the LLC under the operating agreement. Plaintiff does allege that, prior to his dissociation from the company, which apparently occurred around October 11<sup>th</sup>, 2011, defendant entered into “various transactions” with third parties Raul Santellan and RNS Farms. (FAC, ¶¶ 21-23.) As a result of the transactions, RNS Farms filed a lawsuit against defendant and S&S Produce, *RNS Farms v. S&S Produce, LLC*, Fresno County case number 10 CE CG 03396. (*Id.* at ¶ 24.) Plaintiff further alleges that a jury ultimately found S&S and defendant liable for damages of \$182,306.90 in the RNS case. (*Id.* at ¶ 33.) Plaintiff alleges that defendant breached his fiduciary duties to plaintiff in his “dealings with plaintiff”, which caused plaintiff to suffer personal losses. (*Id.* at ¶¶ 35-48.) Plaintiff claims that his losses were to him personally, and not to the LLC, because he was the sole owner of the company. (*Id.* at ¶¶ 38-39.)

Thus, it appears that plaintiff is alleging that defendant's conduct with regard to the transactions with RNS that led to the underlying lawsuit being filed were also breaches of the operating agreement between plaintiff and defendant. However, it is unclear exactly what acts or omissions defendant committed that constituted a breach of the operating agreement. If the conduct was the defendant's business transactions with RNS, any breach of contract claim would appear to be barred by the four-year statute of limitations. (Code Civ. Proc. § 337, subd. (1).) The court intends to take judicial notice of the date that the underlying *RNS* complaint was filed, which was September 29<sup>th</sup>, 2010. (Request for Judicial Notice, Exhibit A.) Thus, any misconduct by defendant must have occurred prior to September 29<sup>th</sup>, 2010. Indeed, RNS alleged in

the underlying complaint that the wrongful acts occurred between October of 2008 and April of 2009. (RNS Complaint, ¶ 32.) Since the complaint in the present action was not filed until October 7<sup>th</sup>, 2015, it appears that the present breach of contract claim may be time-barred, assuming it is based on the defendant's conduct related to the RNS transactions.

However, at this point it would be premature to determine that the breach of contract claim is time-barred, since the allegations of the complaint regarding the exact nature of the breach are so vague and ambiguous that it is impossible to be sure what defendant allegedly did or failed to do that constituted a breach of the operating agreement. It is also impossible to be certain that plaintiff was actually aware of the wrongful conduct in 2008, 2009, or 2010, since defendant was the manager for S&S during that time period and plaintiff did not take over the company until October 11<sup>th</sup>, 2011. (FAC, ¶ 22.) Presumably, plaintiff became aware of the RNS lawsuit by the time it was served, but not necessarily when it was first filed. However, defendant has not requested that the court take judicial notice of the proof of service of summons for the complaint, or S&S's answer, so the court cannot find that the statute bars the breach of contract claim at this time. Nevertheless, since the claim is uncertain and insufficiently alleged, the court intends to sustain the demurrer to the first cause of action for breach of contract, with leave to amend.

Likewise, the court intends to sustain the demurrer to the second cause of action for breach of fiduciary duty. "The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach." (*Meister v. Mensinger* (2014) 230 Cal.App.4th 381, 395, internal citation omitted.)

Here, plaintiff alleges that defendant owed him a fiduciary duty because they were both members of the LLC. (FAC, ¶¶ 16-19, 34-35.) However, while plaintiff alleges that defendant breached his fiduciary duty and caused damages to plaintiff as a result (*id.* at ¶¶ 37, 38), it is unclear exactly what conduct constituted a breach of fiduciary duty, or how the breach resulted in harm to plaintiff. It seems that plaintiff may be alleging that defendant's conduct in his transactions with RNS, which led to S&S being sued by RNS and ultimately held liable for damages to RNS, was the breach of duty. However, this is not clearly alleged in the FAC. Plaintiff also might be alleging that defendant breached his fiduciary duty somehow by persuading or encouraging plaintiff to contribute to his defense in the RNS action. Again, however, such facts are not clearly alleged in the FAC. Nor is it clearly alleged how any alleged breach led to harm to plaintiff.

Therefore, the court intends to sustain the demurrer to the breach of fiduciary duty cause of action for failure to state facts sufficient to constitute a cause of action and uncertainty. The court also intends to grant leave to amend, since it is possible that plaintiff might be able to allege additional facts to show a breach of duty and resulting damages.

**Issued By:** DSB **on 08/15/16.**  
(Judge's initials) (Date)

### **Tentative Ruling**

(17)

Re: ***VSS International, Inc. v. Papich Construction Co., Inc.***  
Court Case No. 16 CECG 00818

Hearing Date: August 24, 2016 (Dept. 502)

Motion: Motion for Discharge of Stakeholder [Interpleader]

#### **Tentative Ruling:**

To grant. Defendant County of Kings shall be discharged from all liability to all parties in this action with reference to the stop payment notice served on or about December 15, 2015. The County of Kings shall deposit the sum of \$13,574.63 with the Clerk of this court within 10 days of the service of this minute order. The County of Kings shall be dismissed from the action. Plaintiff VSS International, Inc. dba VSS Emultech and defendant Papich Construction Co., Inc. shall litigate their respective claims to the fund. All parties in this action are hereby restrained from instituting or further prosecuting any other proceedings in this or any other court in the State of California affecting the rights and obligations with respect to the cash deposit until further order of this court. The deposited sum shall be held pending the outcome of this proceeding, to be disbursed upon further order of this court.

#### **Explanation:**

The County is moving to interplead the \$13,574.63 in funds held under Code of Civil Procedure section 386.5, which provides:

Where the only relief sought against one of the defendants is the payment of a stated amount of money alleged to be wrongfully withheld, such defendant may, upon affidavit that he is a mere stakeholder with no interest in the amount or any portion thereof and that conflicting demands have been made upon him for the amount by parties to the action, upon notice to such parties, apply to the court for an order discharging him from liability and dismissing him from the action on his depositing with the clerk of the court the amount in dispute and the court may, in its discretion, make such order.

(Code Civ. Proc., § 386.5.)

The Declarations of Kevin McAlister and Dominic Tyburski make it clear that the defendant County of Kings has no right or claim to the \$13,574.63 currently held pursuant to the stop notice by plaintiff. Both plaintiff and defendant Papich Construction Co., Inc. have made competing claims to the fund. (McAlister Decl. ¶ 4; Tyburski Decl. ¶¶ 3, 5, 7.) The County's interest is that of a mere stakeholder. Both

plaintiff and Papich have filed notices of non-opposition to this motion. Accordingly, the motion is granted.

Attorney's fees are not requested and not awarded.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**

**Issued By:** DSB **on 08/23/16.**  
(Judge's initials) (Date)

## **Tentative Rulings for Department 503**